IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al. **Plaintiffs,** **vs.** **Tyson Foods, Inc., et al.,** **Defendants.**	**Case No. 4:05-cv-00329-GKF-PJC** **DEFENDANTS' JOINT MOTION TO STRIKE PORTIONS OF THE ERRATA SHEET OF PLAINTIFFS' PROFFERED PUNITIVE DAMAGES EXPERT DAVID R. PAYNE**

Defendants respectfully move the Court to strike portions of the errata sheet of Plaintiffs' proffered punitive damages expert, David R. Payne, and offer this integrated brief in support. Defendants have moved to exclude Mr. Payne's expert opinions on the grounds that his testimony on each Defendant's "ability to pay" punitive damages invades the province of the jury. (*See* Defs.' Mot. to Exclude: Dkt. No. 2263.) Plaintiffs improperly seek to rehabilitate Mr. Payne's flawed analyses and opinions by offering modified opinions through the guise of a deposition "errata." This Court should strike this latest attempt by Plaintiffs to bolster the weak work of their challenged experts. (*See also* Dkt. Nos. 2241, 2299, and 2339 (Defendants' related motions to strike late disclosed expert opinions that Plaintiffs have offered in various formats).)

Specifically, Plaintiffs' use the mechanism of deposition errata to "clarify" a number of issues that Payne had ample opportunity to explain while under oath.[1] Because Payne did not

[1] In fact, Defendants received Mr. Payne's errata the day before the deadline for a *Daubert* motion related to his testimony. (*See* May 14, 2009 Sched. Ord.: Dkt. No. 2049). The Plaintiffs, well aware of the Court-ordered deadline, and anticipating that the Defendants would move to exclude Mr. Payne's testimony, have attempted (unsuccessfully) to rehabilitate their witness in an inappropriate matter.

offer these opinions either in his multiple reports or at his deposition,[2] Defendants have been denied an opportunity for effective cross-examination and counter-analysis. As Mr. Payne's errata exceeds the bounds of Rule 30(e) and Defendants would be prejudiced if it were allowed, the Court should strike the improper portions of the errata.

FACTUAL BACKGROUND

Federal Rule of Civil Procedure 30(e) allows a deponent to review his or her transcript and make changes to that transcript, by providing a signed "statement listing the changes and the reasons for making them." Defendants acknowledge that a few of Mr. Payne's errata are appropriate and consistent with Rule 30(e). For instance, Mr. Payne appropriately noted a number of transcription errors, correcting "Klein" to "Cline" and "Christie" to "Kristi."[3] (Payne Errata: Ex. 1 at 9, 10). But for a significant number of his "clarifications," Mr. Payne goes beyond simple error correction, and instead attempts to justify his prior errors, omissions, and inability to explain his methodology in his reports and during his deposition.

Mr. Payne's inappropriate efforts to rehabilitate his testimony are best illustrated by the series of missteps related to the Standard Industrial Classification ("SIC") codes, which he purportedly uses to identify industry comparables when determining each Defendant's "ability to pay." With respect to Cargill, Inc., Mr. Payne's initial report identified only one applicable SIC code. (Dkt. No. 2263-10 at 7). In his revised report, however, Mr. Payne used four different SIC codes for Cargill, Inc. (*See* Dkt No. 2263-1 (Payne Dep.) at 123-24.) Because of the variety of

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[2] Mr. Payne's report was due on January 5, 2009. (*See* Nov. 15, 2007 Sched. Ord.: Dkt. No. 1376.) Defense counsel deposed him on April 27-28, 2009. Mr. Payne completed his errata sheet on June 17, 2009.

[3] Mr. Payne's deposition Errata Sheet is attached hereto as Exhibit 1.

SIC codes he attributed to Cargill, Inc., Mr. Payne admitted he had to abandon the comparables analysis using the multiples contained in the SIC codes. (Dkt. No. 2263-3 at 9.)

Now, on the errata, Mr. Payne adds an argumentative gloss, attempting to explain away the unreliability of using these SIC codes. (*See* Ex. 1 at 11, 12, 21, 23.) But a review of the deposition transcript reveals that Mr. Payne had a number of opportunities to fully explain why he chose the SIC codes. (*See* Dkt. No. 2263-1 at 102-24, 189-204.) For example, Mr. Payne was specifically asked, "what was your basis for identifying the appropriate SIC composite numbers that appear in this report as related to Cargill, Inc.?" and "how did you select then these four [SIC codes] rather than others that Cargill would fall within?" (Dkt. No. 2263-1 at 114, 191-92.) Yet Payne never explained this additional gloss he now introduces. (*See id*.; *see also* Ex. 1.) Had he articulated this additional explanation in response to any of the questions posed regarding SIC codes, defense counsel would have had the opportunity to probe Mr. Payne as to his reasoning.

Payne's errata also attempts to introduce for the first time a new basis for his opinions – a 1997 EPA policy memorandum[4] that was not part of his underlying reports or produced among his considered materials, nor discussed at his deposition. (*See* Ex. 2: EPA, "General Policy on Superfund Ability to Pay Determinations," Sept. 30, 1997.) As a result, Defendants have been denied the opportunity to question Mr. Payne about the EPA policy on which he now purports to base at least part of his opinions. (*See* Ex. 1 at 33-34, 61-62.) Because Mr. Payne's approach to "ability to pay" is novel, Defendants repeatedly asked him to identify any treatises, authorities,

[4] The full EPA memorandum is attached hereto as Exhibit 2. Plaintiffs have submitted selected portions of this memo as an exhibit to their opposition to the Motion to Exclude Payne. (*See* Dkt. No. 2316-4).

or other references that support his theory. (*See* Dkt. No. 2263-1 at 231-41, 270-71, 546-47.) In fact, Defendants spent hours questioning Mr. Payne about this concern. Further, Plaintiffs were asked in advance of the deposition to provide a list of Mr. Payne's reference materials; in response, Mr. Payne and Plaintiffs' counsel created a list of the sources Mr. Payne considered in formulating his opinion. (*See* Dkt. No. 2263-1 at 617.)[5] On its face, and based on Defendants' preliminary research, the EPA memorandum has no relevance to Defendants' "ability to pay" punitive damages. Regardless, this type of change is contrary to the purpose of Rule 30(e), presents additional support about which Defendants had no opportunity to inquire during the deposition, and amounts to improper bolstering.

ARGUMENT

I. MATERIAL ALTERATIONS TO DEPOSITION TESTIMONY CONTRAVENE THE PURPOSE OF RULE 30(e).

The "clarifications" or additions that Mr. Payne seeks to append to his deposition testimony are substantive changes that contravene the purpose of Rule 30(e). Although Rule 30(e) permits a deponent to review his or her deposition transcript, and to make changes to that transcript by signing "a statement listing the changes and the reasons for making them," *see* Fed. R. Civ. P. 30(e), the Tenth Circuit holds that this Rule does not allow errata that "stray[] substantively from the original testimony." *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002); *see also Owens v. Resource Life Ins. Co.*, No. 06-cv-0346-CVE-FHM, 2007 U.S. Dist. LEXIS 65734, *23 (N.D. Okla. Sept. 5, 2007) (Rule 30(e) "allow[s] corrections

[5] The list was provided to Defendants for the first time on the afternoon of the second day of Mr. Payne's deposition, and is titled "Standards, Principles and Guidance Financial Condition, Viability, Reorganization Value Ability to Pay Creditors, Absolute Priority, Fair & Equitable and Adequate Disclosure." (*See* Dkt No. 2263, Ex. 1A: Payne Dep. at 617-20.) The list was marked as Deposition Exhibit 33 and is attached hereto as Exhibit 3.

to the reporter's transcript or to correct formal errors, but deponents may not make wholesale changes to the substance of their deposition testimony.").

As this Court has noted, Rule 30(e) exists to correct mistakes in transcription or reporting. *See Owens*, 2007 U.S. Dist. LEXIS at *23. The Rule does not "allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses .... A deposition is not a take home examination." *Garcia*, 299 F.3d at 1242 n.5 (citing *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992)); *see also Saffa v. Okla. Oncology, Inc.*, 405 F. Supp. 2d 1280, 1284 (N.D. Okla. 2005) (applying *Garcia*, 299 F.3d at 1242 n.5); *Foraker v. Schauer*, 2005 U.S. Dist. LEXIS 46071, *8 (D. Colo. Sept. 8, 2005) (striking changes that do not simply correct any alleged errors made by reporter).

A. Mr. Payne's "Clarifications" Are Improper "Morning-After" Changes to Testimony.

A deposition errata sheet provides an opportunity to correct mistakes, not for an expert to reconsider his responses. After-the-fact additions to testimony such as those contained in Mr. Payne's errata are disfavored because such "clarifications" are seen as nothing more than "morning-after efforts" to impermissibly alter sworn testimony. *See, e.g., Foraker*, 2005 U.S. Dist. LEXIS *12-13 (finding expert's errata "little more than his morning-after efforts to answer the deposition questions of defense counsel better than he did during the deposition."). "Taking more time to formulate a response is exactly what the majority of courts find troubling" with substantive changes made in errata. *Chemfree Corp. v. J. Walter, Inc.*, 2008 U.S. Dist. LEXIS 107283, *9 (N.D. Ga. Sept. 30, 2008) (citing *Garcia*, 299 F.3d at 1242 n.5).

Rule 30(e) only provides litigants "a vehicle ... to correct what was reported in the transcript." *Foraker*, 2005 U.S. Dist. LEXIS at *8; *see also Owens*, 2007 U.S. Dist. LEXIS at

*22 (finding a substantial change to a response inappropriate when deponent had no reason to not answer defense counsel's question more completely during deposition). Here, however, Mr. Payne's deposition transcript reveals ample opportunity for him to have fully explained his answers. (*See* Dkt. No. 2263-1 at 231-41, 270-71, 546-47.) The addition of substantive material through Mr. Payne's deposition errata indicates nothing more than "morning-after" attempts to alter his answers, having had the benefit of hindsight and additional time to reformulate them. Consequently, the Court should strike Mr. Payne's efforts to rewrite portions of his testimony.

Moreover, the case law reveals many courts striking an **expert's** errata because the changes violated Rule 30(e). For example, and similar to the case at bar, in *Chemfree*, a plaintiff's expert proffered that his changes provided "a more complete answer" or clarified responses. 2008 U.S. Dist. LEXIS at *9; *see also Foraker*, 2005 U.S. Dist. LEXIS at *8, 13 (expert's changes abuse Rule 30(e) in an effort to provide a "better" answer); *Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994). Similarly, Mr. Payne's "clarifications" do precisely that which these decisions seek to avoid—alter answers after enjoying almost two months time in which to reconsider his response. Such changes contravene the purpose of Rule 30(e), and therefore should be stricken.

B. None of the Factors Considered by the Tenth Circuit Would Permit Mr. Payne's "Clarifications."

The Tenth Circuit instructs that in considering a challenge to deposition errata, the Court should examine whether the deponent was cross-examined at the deposition, whether the corrections are based on newly available evidence, and whether the transcript reflects that the deponent was confused during the deposition. *See Burns v. Bd. of County Comm'rs of Jackson*

County, Kan., 330 F.3d 1275, 1282 (10th Cir. 2003).[6] *Burns* upheld the district court's decision to disregard altered deposition testimony, in part because the transcript did not "reflect any obvious confusion – as opposed to indecisiveness or inconsistency – that the corrections would need to clarify." *Id.*; *see also Reynolds v. IBM*, 320 F. Supp. 2d 1290, 1301 (M.D. Fla. 2004) (concluding that deposition answers "do not reflect any obvious confusion that would justify the material alterations the errata sheet attempts to make to his original testimony."); *Wigg v. Sioux Falls Sch. Dist. 49-5*, 274 F. Supp. 2d 1084, 1091-92 (D.S.D. 2003), *rev'd on other grounds* 382 F.3d 807 (8th Cir. 2004) (disregarding changes to deposition testimony when finding "nothing in the deposition to indicate that the Plaintiff was confused or did not understand the question").

First, here, Mr. Payne purports to be an educated and experienced deponent (*see* Dkt. No. 2263-1 at 440-44), and the deposition transcript evidences that he understood the questions defense counsel asked. *Cf., e.g.*, *Wigg*, 274 F. Supp. 2d at 1092 (noting that deponent was "educated and intelligent" when striking errata sheet). Mr. Payne does not – nor fairly could he – claim that he was confused by defense counsel's questions. Thus, any possibility of confusion offers no justification for the changes Mr. Payne attempts to make to his deposition answers.

Second, defense counsel questioned Mr. Payne repeatedly about the sources he used when formulating his opinion. (*See* Dkt. No. 2263-1 at 231-41, 270-71, 546-47.) Despite the repeated questioning, Mr. Payne never once even hinted that EPA policy or CERCLA provided additional guidance as to his opinions on "ability to pay." (*See id.*) Nor did Mr. Payne otherwise identify these sources as bases for his opinions. (*See* Ex. 3.)

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[6] Although Plaintiffs' counsel did not examine Mr. Payne at the deposition, he is their witness, and they withdrew him at the end of the day. (*See* Dkt. No. 2263, Ex. 1A: Payne Dep. 619-20.)

Third, Mr. Payne and Plaintiffs' counsel had an obligation to ensure that he had adequately prepared for the deposition. *Cf. Chemfree*, 2008 U.S. Dist. LEXIS at *8 (finding that plaintiff had burden to prepare its own expert before the deposition); *Welch*, 856 F. Supp. at 1502 (same). A deposition is not a "take home examination," *see Garcia*, 299 F.3d at 1242 n.5 (citing *Greenway*), and Mr. Payne simply may not later insert additional substantive details that he could have testified to at the time of his deposition. *See, e.g., Owens*, 2007 U.S. Dist. LEXIS at *20 (striking correction that "did not set forth newly discovered evidence."). Plaintiffs' failure to adequately prepare their own expert for his deposition also cannot justify Mr. Payne's later formulated "clarifications." *See Welch*, 856 F. Supp. at 1502 ("It was plaintiff's responsibility to ensure that her expert was fully prepared and informed *before* the expert provided unwavering testimony ….") (emphasis in original).

Fourth, Mr. Payne does not attempt to set forth newly discovered evidence; rather, the additional information Mr. Payne seeks to include for "clarification" was all available to him prior to his deposition.

The Tenth Circuit's reasoning as set forth in *Garcia* is highly applicable to the situation at hand. Mr. Payne's errata "clarifications," which attempt to introduce substantive material to deposition testimony given under oath, find no justification in Rule 30(e) or the law of this Circuit and must be stricken.

II. ANY BASIS FOR EXPERT OPINION MUST BE TIMELY DISCLOSED.

Attempting to recover from inadequate preparation by subsequently altering deposition testimony in Mr. Payne's errata sheet not only undermines the purpose of Rule 30(e), it also offends the purpose behind Rule 26(a)(2)'s requirements for timely expert disclosures. The legal standard for reviewing untimely expert supplementations is set forth in Defendants' Motion to Strike Plaintiffs' New and Undisclosed Expert Opinions (Dkt. No. 2241) and, in the interest of

judicial economy, Defendants incorporate the legal analysis in that brief by reference. In short, this Court has declared that a report that attempts to "strengthen or deepen" the original opinions expressed by the expert exceeds the bounds of permissible supplementation. (*Id*. at 4 (citing Jan. 29, 2009 Ord.: Dkt. No. 1839).)

Mr. Payne's after-the-fact "clarifications" adding bases for his opinions on each Defendant's "ability to pay" punitive damages unfairly foreclose Defendants from questioning him about these additional bases. The opportunity to cross-examine, particularly where experts are concerned, "prevent[s] unfair surprise at trial" and "also prevents experts from 'lying in wait' to express new opinions at the last minute, there by denying the opposing party the opportunity to depose the expert on the new information." *Foraker*, 2005 U.S. Dist. LEXIS at *9, 10 (citing *Keener v. United States*, 181 F.R.D. 639, 641 (D. Mont. 1998)); *see also Rios v. Bigler*, 847 F. Supp. 1538, 1547 (D. Kan. 1994) ("Allowing such a change would deprive defendants of any opportunity to inquire as to the basis or substance of this new opinion.").

As the Court in this case has already observed, each time Defendants must respond to supplemental information from Plaintiffs' experts, "they have been addressing a moving target, resulting in a waste of time and resources." Oct. 28, 2008 Ord. at 4: Dkt. No. 1787; *see also Palmer v. Asarco*, 2007 U.S. Dist. LEXIS 56969, at *15 (N.D. Okla. Aug. 3, 2007) (Rule 26 does not allow parties "to sandbag" opposing counsel with information that should have already been disclosed). Plaintiffs' attempt to insert additional expert opinions only after Mr. Payne's deposition (via errata sheet) creates yet another "moving target." Because of the strong policy favoring timely expert disclosures and to prevent unfair surprise, the Court should strike Mr. Payne's improper deposition errata.

CONCLUSION

Mr. Payne's deposition errata seeks to improperly add substantive information; therefore the Court should strike those portions of the errata which go beyond mere correction, and specifically lines 11, 12, 21-22, 23-24, 33-34, and 61-62, as violative of Rules 30(e) and 26(a)(2).

Respectfully submitted,

July 20, 2009

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